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October 14, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND-DELIVERY

Regina Keeney, Chief
International Bureau
Federal Communications Commission
2000 M Street, N.W.
Suite 800
Washington, D.C. 20554

Re: DBS Public Interest Obligations, MM Docket No. 93-25; ***EX PARTE***

Dear Ms. Keeney:

As the Commission nears the adoption of an order in the above-referenced proceeding, DIRECTV, Inc. ("DIRECTV") wishes to reiterate its strong view that the DBS public interest obligation required by Section 335 of the Communications Act, 47 U.S.C. § 335, should be implemented in harmony with the overall purpose of the 1992 Cable Act that added the provision, *i.e.*, fostering effective competition with cable television operators by encouraging the development of alternative multichannel video programming distributor ("MVPD") technologies such as DBS. An overly restrictive approach to the implementation of Section 335 -- one that would narrow unnecessarily the sources of public interest programming from which DBS providers can draw upon to meet the obligation, or that would compel DBS providers to use a cable leased access model -- does not advance this goal.

In particular, as the Commission promulgates public interest regulations based upon Section 335(b), DIRECTV urges the Commission to grant DBS providers maximum flexibility to choose an optimal "mix" of quality educational or informational programming to

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fulfill the obligation. Contrary to the views expressed by some participants in this proceeding, Section 335 does *not* "prohibit[] DBS providers from selecting" programming that will be used to meet their public interest responsibilities under that section.[1] Nor does it preclude Commission adoption of a reasonable view of the eligible sources of "noncommercial programming of an educational or informational nature." In fact, DBS providers should be encouraged to pursue innovative programming arrangements and creative packaging of noncommercial educational and informational programming. The Commission need not and should not subject DBS providers and their subscribers to a regime of inferior and unwatched PEG or leased access-type channels.

The Meaning of "Editorial Control"

Section 335(b)(3) states that DBS providers "shall not exercise any editorial control over any video programming provided pursuant to this subsection."[2] There is no dispute that "editorial control" clearly means that a DBS provider may not edit or censor the content of noncommercial educational or informational programming carried on its system to meet the Section 335(b) carriage obligation. The fundamental question in this proceeding, however, is whether Section 335's prohibition on "editorial control" should be read more expansively to prohibit DBS providers from having the discretion even to select eligible program channels that they will carry to fulfill their public interest obligation.

DIRECTV strongly believes that the Commission can and should interpret Section 335 in a manner that permits DBS providers to select quality noncommercial educational and informational program channels and offerings, and to "package" them in creative and subscriber-friendly ways, without violating the Section 335(b)(3) prohibition on the exercise of "editorial control." The courts have recognized in the analogous context of the provision of Internet on-line services that a provider's status as a program "packager," which admittedly involves the exercise of some discretion by the provider in choosing which program channels to carry, does not mean that the provider exercises "editorial control."[3] The Commission should

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1 *See* Ex Parte Memorandum of Media Access Project (Aug. 13, 1998) ("MAP August Ex Parte") at 1.

2 47 U.S.C. § 335(b)(3).

3 For example, in a libel action against Compuserve, a plaintiff claimed that defamatory statements were made in a publication carried by Compuserve in a computerized database. The court granted summary judgment for Compuserve, reasoning that:

> While Compuserve may decline to carry a given publication altogether, in reality, once it does decide to carry a publication, it will have little or no editorial control over that publication's contents. This is especially so when Compuserve carries the publication as part of a forum that is managed by a company unrelated to Compuserve. . . . *Compuserve has*

promulgate an implementing rule here that similarly will permit DBS providers like DIRECTV to make threshold decisions as to the program offerings that will be used to satisfy their Section 335 public interest obligation, without being judged to have exercised "editorial control" over the content of such programming.

Contrary to the views of the Media Access Project ("MAP"), such a rule flows not only from a pro-competitive public policy, it is also the most natural reading of the language and grammar of Section 335. Section 335(b)(3) states that DBS providers may not exercise "editorial control" over "video programming" once a decision has been made that the video programming will be "provided" pursuant to that Section. 47 U.S.C. § 335(b)(3). MAP's focus on whether the term "editorial control" encompasses the "selection and placement of programming"[4] both misses the point and begs the question.

MAP misses the point because DBS providers *agree* that they cannot "select[]," "place[]" or edit particular content on a program service once that service is being "provided" and relied upon to satisfy Section 335 obligations.[5] MAP begs the question by not addressing with precision the fundamental inquiry raised by the text of Section 335(b)(3): Can a DBS provider make initial selections regarding the Section 335 program services it will carry, understanding that it can exercise no "editorial control over" the programming content once the decision has been made to carry a particular program service?

The answer to this question is "yes." Neither the language nor the legislative history of Section 335 mandates a "first-come, first-served" cable leased access model for DBS that will yield only additional channels of unwatched programming. Nor does the fact that Congress prohibited cable operators from exercising "editorial control" in the context of creating

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> *no more editorial control over such a publication than does a public library, book store or newsstand. . .*

Cubby, Inc. v. Compuserve, Inc., 776 F. Supp. 135, 140 (S.D.N.Y. 1991) (emphasis added); *see Zeran v. American Online, Inc.*, 129 F.3d 327 (4th Cir. 1997). MAP acknowledges that Compuserve was not found liable under New York law because "it did not exercise editorial control over the contents of the certain publications contained in its online 'Journalistic Forum,'" *MAP August Ex Parte* at 4 n.4, but fails to apprehend DIRECTV's point in making the analogy: courts often apply narrow definitions of "editorial control" that exclude the exercise by the provider of its discretion to carry a particular publication or channel.

4 *MAP August Ex Parte* at 1.

5 *See, e.g.,* Ex Parte Presentation of United States Satellite Broadcasting Co., Inc. (Oct. 2, 1998) at 1; ("editorial control" means that DBS providers may not edit or censor material within noncommercial programs provided pursuant to Section 335).

a common-carrier-like capacity obligation for cable operators under Section 612 of the Cable Act, 47 U.S.C. § 532, dictate that a similar regime be imposed here.

To the contrary, fundamental differences between the cable leased access regime and the DBS public interest obligation arise directly from the language and purpose of the respective provisions. Congress's creation in 1984 of the cable leased access regime -- and the stringency of its "first come, first served" approach -- was predicated upon the fear that cable operators "would exercise their substantial market power to exclude disfavored programmers." *Denver Area Educational Telecommunications Consortium. Inc.* (*"DAETC"*) *v. FCC*, 518 U.S. 727, 810 (1996) (Kennedy, J., concurring in part, concurring in judgment in part, and dissenting in part); *see* H.R. Rep. No. 934, 98th Cong., 2d Sess. 48 (1984) (recognizing that cable operators have market power to exclude, for example, programming which "competes with a program service already being provided by that cable system").[6] Thus, the text of Section 612(c) not only prohibits the exercise by cable operators of "editorial control of video programming provided pursuant to this section" (as does Section 335 with respect to DBS), it further prohibits cable operators from "*in any other way consider[ing] the content of such programming.*" 47 U.S.C. § 532(c) (emphasis added).

It is the language highlighted above which prohibits cable operators from selecting programming that will meet their leased access obligations. In this regard, Section 335 -- unlike Section 612 -- does *not* contain a blanket prohibition against DBS providers "consider[ing] content" in any circumstance. It is a well-established principle of statutory construction that Congressional inclusion of particular language in one section of a statute, combined with the omission of that language in another section of the same Act, generally means that Congress has acted "intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). The absence of similar language in Section 335 signifies that Congress did not intend to limit the ability of DBS providers to select which program offerings to carry in order to satisfy their Section 335(b) obligation.[7] Moreover, the textual distinction between Section 612 and Section 335 comports with the quite different purposes of the two provisions. The purpose of the cable leased access provision was to provide a means by which *commercial* programmers that could not negotiate a carriage agreement with the monopoly cable operator could buy their way onto the system. *See, e.g., DAETC,* 518 U.S. at 810. In contrast, the purpose of Section 335 was simply to ensure that DBS systems provide a

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6 MAP completely ignores the fact that DBS providers exercise no analogous market power -- which is in part why Section 335 and Section 611 are fundamentally different and do not inform the interpretation of each other.

7 Significantly, MAP does not even mention the existence of this second clause of Section 612(c), which fatally undercuts MAP's claim that the language of Section 612 is "identical" to the language of Section 335. *MAP August Ex Parte* at 5; *see* Ex Parte Memorandum of Media Access Project (Sept. 10, 1998) at 1-2.

"minimum level of educational programming." H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 100 (1992).[8]

The conclusion that the prohibition of cable operator discretion to pick and choose particular programming in the leased access context arises not from the "editorial control" language of Section 612, but from the additional prohibition on consideration of content "in any other way," is confirmed by the text and operation of Section 611, 47 U.S.C. § 531, which addresses the set aside of cable channels for public, educational or governmental ("PEG") use. Unlike the Section 612 cable leased access obligation and the Section 335 DBS public interest obligation, which are federal obligations imposed by the Communications Act, Section 611 does not directly require a cable operator to set aside capacity for PEG channels. Instead, Section 611 simply authorizes local franchising authorities to require cable operators contractually to set aside channel capacity for PEG *use* when cable operators seek to obtain or renew franchises. *See* 47 U.S.C. § 531(b).

Significantly, while cable operators are forbidden from exercising "editorial control" over PEG use of the channel capacity, 47 U.S.C. § 531(e), there is no "other consideration of content" clause imposed with respect to the PEG requirement. That is because the rules and procedures under which the capacity may be used, including the types of users that qualify and the amount of capacity that is to be set aside, are to be prescribed in the franchise agreements negotiated between cable operators and municipalities. *See DAETC*, 518 U.S. at 790 (Kennedy, J., concurring in part, concurring in judgment in part, and dissenting in part); *McClellan v. Cablevision,* 149 F.3d 161, 168 (2d. Cir. 1998) (cable operators do not "exercise broad control over public access" channels because Congress instead permits "locally accountable authorities to enforce the franchise agreements and control the operation of public access channels"); *see also Beach Communications, Inc. v. FCC,* 959 F.2d 975, 984 (D.C. Cir. 1992) (franchising authorities have broad discretion to define cable operator duties under PEG provision). In fact, those rules and procedures vary from franchise agreement to franchise agreement.

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[8] The same concern about the market power of cable operators that led Congress to impose restrictive leased access provisions should lead the Commission here to provide DBS providers with as much flexibility as possible in packaging noncommercial educational and informational programming in an attractive, cable-competitive fashion, since there is no question that a central purpose of the Cable Act of 1992 was to promote the development of DBS and other mutichannel video alternatives to incumbent cable television operators. Given that cable television operators continue to dominate the MVPD market, serving approximately 84% of MVPD subscribers, *see* Comments of the National Cable Television Association, CS Docket No. 98-102 (July 31, 1998), at 6, this goal should remain paramount.

There is no statutory delegation to another entity to determine the usage of the Section 335 capacity, as there is to cities through the franchising process under the PEG regime of Section 611. There also is no additional clause restricting DBS providers from "in any other way consider[ing] the content of" video programming provided pursuant to Section 335, as there is under the Section 612(c)(2) leased access provision. In short, Congress plainly did not choose to limit the ability of DBS providers to exercise a threshold level of discretion in selecting which noncommercial educational or informational programming to carry in satisfaction of the Section 335 obligation.

MAP has stated that two Second Circuit cases, *Time Warner Cable v. Bloomberg,* 118 F.3d 917 (2d Cir. 1997), and *McClellan v. Cablevision*, 149 F.3d 161 (2d Cir. 1998), "adopted a broad definition of editorial control" and "demonstrate the danger associated with adopting an exceedingly narrow definition of editorial control in the DBS arena." *MAP August Ex Parte* at 2. These cases, however, do nothing of the kind, and MAP has fundamentally misread them.

For example, in *Time Warner Cable*, a cable operator sued to prevent a city from using PEG capacity to carry the 24-hour commercial programming of Fox News or Bloomberg. The district court had enjoined the city on the grounds that Time Warner would likely succeed in its claim that the city's proposed use of PEG capacity would violate Time Warner's First Amendment rights. The Second Circuit upheld the injunction while avoiding the constitutional question, finding that the injunction could be upheld based on the district court's interpretation of the language of several franchise agreements between Time Warner and the city. *See Time Warner Cable*, 118 F.3d at 926.[9] More important, the city had attempted to invoke a broad interpretation of Section 611's prohibition of cable operator "editorial control" in order to foreclose Time Warner's ability to sue. The court rejected this claim, observing that while Section 611(e) "bars the [cable] operator from attempting to determine the content of PEG programming that is within the PEG categories," it "cannot mean that the operator is barred from enforcing the contractual limitations of the agreements whereby the City is allotted PEG channels." *Id.* at 928. Thus, the Second Circuit reasoned:

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[9] One of the key issues in the litigation was whether the franchise agreements could be read to permit "commercial" programming to be transmitted using PEG capacity. The Second Circuit concluded that while the meaning of "commercial" under the agreements was not clear, "we think the District Court proceeded correctly, at least at this preliminary stage of the litigation, by concluding that whatever the Agreements mean, they do not authorize the city to use [the PEG capacity] for programming beyond the categories of 'educational' and 'governmental.'" *Id.* at 926. Interestingly, the Second Circuit observed that there could indeed be circumstances where PEG capacity could be used to carry commercial programming. *Id.* at 926, 928.

> Of course, as to programming *within* the PEG categories, Section [611](e) prohibits the cable operator from exercising any editorial control . . . . However, just as the Postal Service can determine whether a customer's materials are within the category of mail eligible for third class or other reduced rates without being accused of exercising editorial content over materials within such categories, so cable operators may enforce the boundaries of the categories they are obliged to offer municipalities at no charge without violating Section [611](e).

Time Warner Cable, 118 F.3d at 928 (emphasis in original).

In general, the PEG model has little applicability to DBS or Section 335, since fundamentally, PEG obligations are negotiated between local franchising authorities and cable television operators and are primarily contractual in nature. Nevertheless, to the extent that *Time Warner Cable* says anything relevant with respect to "editorial control" as the term is used in Section 335(b)(3), it is that "editorial control" should not be imbued with more meaning than it can bear in a particular statutory context. Under the Section 611 PEG regime, cable operators cannot exercise "editorial control" within PEG categories, but *Time Warner Cable* stands for the proposition that the statute leaves cable operators with the discretion to ensure that cities are truly offering PEG programming as defined under their franchise agreements. Similarly, DBS providers under Section 335 cannot exercise "editorial control" over the content of programming they elect to carry pursuant to Section 335, but they nevertheless are accorded the discretion to make threshold selections as to the noncommercial educational or informational program services that they will carry in order to satisfy their public interest obligation.[10]

In the final analysis, DBS providers know their subscribers and should be entrusted with the discretion to select and package the programming that will enable them to fulfill their statutory public interest obligation, while also attracting the greatest possible consumer interest.[11] The Commission can and should construe Section 335 to achieve this

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10 The fact that the Second Circuit in *McClellan* implied a private cause of action to permit a plaintiff to sue under Section 611 to protest his inability to continue broadcasting on a public access channel is inapposite to the current proceeding. The case simply has no bearing on the scope of "editorial control" contained in Section 335.

11 Even in implementing the cable leased access provision, the Commission attempted within the confines of that statutory scheme to provide cable operators with "flexibility" to "better enable cable operators to assure the growth and development of their cable systems." Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Leased Commercial Access, *Second Report and Order*, 12 FCC Rcd 5267, 5318 (1997). That goal should apply to DBS providers with even greater

reasonable balance. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984).[12]

Definition of "National Educational Programming Supplier"

Section 335(b)(3) requires that a DBS provider meet the requirements of the statute by making channel capacity available to "national educational programming suppliers." Whether that term is read as a subset of Section 335(b)(1)'s definition of a larger pool of noncommercial educational or informational programming, as DIRECTV has urged,[13] or simply is construed broadly to encompass a wide range of programmers, as others have argued, the point is the same: the Commission should interpret Section 335 to permit quality programming from various sources to satisfy Section 335's requirements.

DIRECTV agrees with the commenters who have asserted that Section 335 noncommercial educational or informational programming can and should include commercial-free programming supplied by for-profit corporations[14] and by joint ventures of non-profit and for-profit entities.[15] Offerings such as Encore's commercial-free WAM! network, which is dedicated to serving the needs of 8- to 16-year-old children,[16] or Noggin, a 24-hour, seven-day noncommercial children's educational television service geared to the needs of children 2-11 years old,[17] are plainly of the type envisioned by Congress to fulfill the Section 335 obligation,

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force as the most promising cable competitors. This is particularly so in light of the greater leeway the text of Section 335 gives the Commission to provide for flexibility and the exercise of discretion by DBS providers than it has under Section 612.

12 The Commission should also avoid excessive intrusion on DBS providers' discretion in the interest of avoiding constitutional infirmity. The constitutionality of Section 335 as an abridgment of DBS providers' First Amendment rights is not settled. Although the facial constitutional validity of Section 335 has been narrowly upheld by the one circuit that has considered the issue -- over a vigorous *en banc* dissent by five judges urging a rehearing of the case, *see Time Warner Entertainment Co., L.P. v. FCC,* 93 F.3d 957 (D.C. Cir. 1996), *rehearing en banc denied*, 105 F.3d 723 (D.C. Cir. 1997) (Williams, J., dissenting) -- neither the Supreme Court nor any other Circuit has spoken to the issue. There is no reason for the Commission to ascribe more breadth to the term "editorial control" then the plain language of Section 335 suggests, since such action would simply weaken further the provision's already questionable constitutional foundation.

13 *See* Supplemental Comments of DIRECTV at 9-13.

14 Comments of Encore Media Corporation at 5-12.

15 *See* Ex Parte Letter of Noggin (Sept. 12, 1998).

16 Comments of Encore Media Corporation at 3.

17 *See* Ex Parte Letter of Noggin (Aug. 19, 1998).

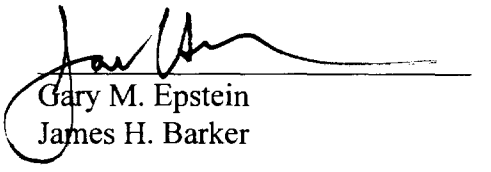
and should be allowed to do so. Just as the Commission acted defensively in the early part of this century to set aside spectrum for educational broadcasting when "'commercial pressures'" in the marketplace were diminishing the percentage of broadcast licenses held by noncommercial entities, *Time Warner Entertainment*, 93 F.3d at 976 (quoting *FCC v. League of Women Voters,* 468 U.S. 364, 367 (1983)), the Commission today should act offensively to encourage and reward for-profit entities that make available valuable commercial-free offerings to the public, and thereby increase the amount of noncommercial educational and informational programming in the MVPD marketplace. Permitting programming like WAM! or Noggin to qualify for Section 335 purposes will help to achieve this goal of "ensuring public access to noncommercial programming." *Time Warner Entertainment*, 93 F.3d at 976.

Finally, the Alliance for Community Media has urged the Commission to require the formation of a "National Access Corporation" to administer DBS public interest obligations. The proposal would feature a Presidentially appointed nine-member board of directors and would be funded by a 5% gross revenue "tax" on DBS providers. *See* Ex Parte Memo of Alliance for Community Media (Sept. 28, 1998). The Commission has no authority to create a Presidentially-appointed Commission or to impose a gross receipts tax on DBS providers. The Alliance's proposals would be blatantly unlawful if imposed and should not be considered further.

Conclusion

The overriding purpose of the 1992 Cable Act, which added Section 335, was to promote vigorous multichannel video competition to cable incumbents. To that end, there is no good policy reason, and no restriction in the statute, that should cause the Commission to unduly restrain DBS operators from exercising their discretion to select from a variety of noncommercial programming sources to fulfill their public interest obligation. As the Commission adopts implementing regulations for Section 335, DIRECTV urges the Commission to construe the Act reasonably to achieve this goal.

Respectfully submitted,



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